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No. 07-924

IN THE

Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner,

—v.—

NOVELL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Thomas W. Burt
Richard J. Wallis
Steven J. Aeschbacher
MICROSOFT CORPORATION
One Microsoft Way
Redmond, WA 98052
(425) 706-8080

David B. Tulchin
Counsel of Record
Steven L. Holley
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
(212) 558-4000

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Rule 29.6 Corporate Disclosure Statement

The corporate disclosure statement in the petition for a writ of certiorari remains accurate.

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Argument

Novell's opposition brief demonstrates the confusion that surrounds the antitrust injury doctrine and highlights the necessity of this Court's intervention. Novell spills considerable ink defending the validity of the multi-factor test for antitrust standing established by *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters* (*AGC*), 459 U.S. 519 (1983).

yet nowhere in its petition does Microsoft take issue with that test. Rather, the pertinent question is whether a plaintiff who is neither a consumer nor a competitor in the allegedly restrained market can suffer antitrust *injury*, which is a prerequisite for antitrust standing. *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104, 110 n.5 (1986).

Novell demonstrates its own confusion when it writes that "None of the cited decisions, nor any of those that supposedly conflict with them, requires that antitrust *injury* must be determined by any method other than analysis of the *AGC* factors." (Opp'n Br. at 14 (emphasis added).) That is entirely incorrect. As this Court stated in 1986: "[I]n *Associated General Contractors* we considered other factors in addition to antitrust injury to determine whether the petitioner was a proper plaintiff under § 4." *Cargill*, 479 U.S. at 110 n.5. While the *AGC* factors address antitrust standing, the definition of antitrust injury is set forth in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), a decision barely mentioned by Novell. There, the Court held that antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick*, 429 U.S. at 489. It is Microsoft's contention – and the holding of several courts of appeals – that such injury cannot be suffered by parties that are not participants in the allegedly restrained market. This is, indeed, the rule set out by Justice Alito in *Barton & Pittinos, Inc.* v. *SmithKline Beecham Corp.*, 118 F.3d 178, 184 (3d Cir. 1997).

Contrary to what Novell contends, Microsoft does not advocate a "bright-line" rule that would determine whether a plaintiff has antitrust standing. Rather, the consumer-or-competitor rule delineates an outer limit on those who can suffer antitrust injury. Of course, those who suffer antitrust injury must still satisfy the additional *AGC* factors in order to have antitrust standing.

Novell also seeks to minimize the extent to which the Fourth Circuit's decision conflicts with decisions of other courts of appeals through a tendentious reading of those decisions. For example, Novell's discussion of *SAS of Puerto Rico, Inc.* v. *Puerto Rico Telephone Co.*, 48 F.3d 39 (1st Cir. 1995) alludes to the First Circuit's observation that although consumers and competitors are "presumptively" proper plaintiffs, "there can be exceptions, for good cause shown." (Opp'n Br. at 10 (quoting *SAS*, 48 F.3d at 45).) Yet Novell tellingly omits the next sentence of the opinion: "The most obvious reason for conferring standing on a second-best plaintiff is that, in some general category of cases, there may be no first best with the incentive or ability to sue." *SAS*, 48 F.3d at 45. This potential exception, even if valid, does nothing to help Novell, as Microsoft has been sued more than 100 times by consumers, competitors and potential competitors in the PC operating system market, paying billions of dollars in settlements to these plaintiffs. (Pet. at 10 n.7.)[1]

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[1] Novell also makes much of the *SAS* court's focus on whether plaintiff "is a competitor or consumer in the market threatened by the alleged violation *or has any other protectable interest* *(footnote continued)*

Novell's reading of the Third Circuit's jurisprudence is also wrong. Ignoring Justice Alito's clear statement of the consumer-or-competitor rule in *Barton & Pittinos*, 118 F.3d at 184 – a decision that Novell disparages as "rigid" and "simplistic" (Opp'n Br. at 13) – Novell relies (*id.* at 12) on a case that identifies, in dicta, only one possible exception to that rule: a non-consumer-or-competitor may suffer antitrust injury "where the harm is 'inextricably intertwined' with the defendant's wrongdoing." *Carpet Group Int'l, Inc.* v. *Oriental Rug Importers Ass'n*, 227 F.3d 62, 77 (3d Cir. 2000) (internal quotes omitted). Yet as Microsoft has pointed out (Pet. at 12 n.8), the Third Circuit subsequently limited this purported exception to "cases in which both plaintiffs and defendants are in the business of selling goods or services in the same relevant market." *Broadcom Corp.* v. *Qualcomm Inc.*, 501 F.3d 297, 320–21 (3d Cir. 2007).

(footnote continued)
under the antitrust law." (Opp'n Br. at 10 (quoting *SAS*, 48 F.3d at 45).) It is clear from the opinion, however, that the reference to "other protectable interests" embraces only a narrow class of market participants other than consumers and competitors whose injuries flow from harm to competition in the relevant market – a position not held by Novell. The example given by the court is instructive: "a seller may well have a claim if victimized by a price-fixing ring composed of buyers that lowered the market price: in such a case the seller is a participant in the very market where competition is impaired." *SAS*, 48 F.3d at 44. Although technically an exception to the consumer-or-competitor rule, the court's example is in fact a special case of a supplier suffering an injury resembling that of a consumer. *See* 2A Philip E. Areeda et al., ANTITRUST LAW ¶ 335h(3) (3d ed. 2007).

The Fourth Circuit's decision is in direct conflict with these decisions and those of other circuits that have articulated a clear consumer-or-competitor rule. *See, e.g., Norris* v. *Hearst Trust*, 500 F.3d 454, 466 (5th Cir. 2007).

Despite Novell's efforts to read this circuit split out of existence, Judge Katzmann of the Second Circuit acknowledged it as recently as 2005. *Daniel* v. *American Bd. of Emergency Med.*, 428 F.3d 408, 451 (2d Cir. 2005). In addition to the many cases cited by Microsoft on both sides of the split (Pet. at 10–14), its existence has also been recognized by the First Circuit in *Sullivan* v. *Tagliabue*, 25 F.3d 43, 49 (1st Cir. 1994).

Attempting to diminish the significance of *Sullivan*'s identification of a circuit split, Novell states that "the *only* appellate decision the First Circuit cited for its statement" was *Bichan* v. *Chemetron Corp.*, 681 F.2d 514 (7th Cir. 1982). (Opp'n Br. at 13–14 (emphasis in original).) This is also wrong. The First Circuit in *Sullivan*, 25 F.3d at 49, cited decisions of three circuits – *Province* v. *Cleveland Press Pub. Co.*, 787 F.2d 1047, 1052 (6th Cir. 1986); *Bichan*, 681 F.2d at 519; and *Ostrofe* v. *H.S. Crocker Co.*, 740 F.2d 739, 745–46 (9th Cir. 1984). More importantly, as Novell all but concedes (Opp'n Br. at 13) and as the many recent cases cited in the petition demonstrate (Pet. at 10–14), the split has not been resolved in the 14 years since *Sullivan* was decided. The instant case thus presents the perfect vehicle for the Court to clarify this important aspect of our antitrust laws.

Novell's final argument is that "this case is wholly unsuited for considering application of the

'inextricably intertwined' language" from *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465, 484 (1982). (Opp'n Br. at 15.) Yet *McCready* is a key authority on which the Fourth Circuit's decision rests, and the "inextricably intertwined" language is largely responsible for the existing circuit split regarding the proper scope of antitrust injury.

The court of appeals cited *McCready* as offering "additional support" for the proposition that antitrust injury is not limited to consumers or competitors, and specifically quoted the "inextricably intertwined" formulation. (A23–24.) Even if the Fourth Circuit did not expressly rely on that language, it relied on the decisions of other courts that have. For example, *Carpet Group* states that "although generally only competitors and consumers will suffer antitrust injury . . . , such injury may in some circumstances inhere where the harm is 'inextricably intertwined' with the defendant's wrongdoing." *Carpet Group Int'l*, 227 F.3d at 77 (internal quotes omitted).

Novell's highly implausible theory of liability underscores the importance of a clear rule about the scope of antitrust injury.[2] One of the purposes of the

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[2] The Department of Justice's case was predicated on the notion that Microsoft's position in the PC operating system market was protected by an "applications barrier to entry" comprised of more than 70,000 applications written for Windows. *United States* v. *Microsoft Corp.*, 253 F.3d 34, 55 (D.C. Cir. 2001). Novell's claims are based on the idea that only two such applications – WordPerfect and Quattro Pro – were sufficient to make other PC operating systems viable competitors to Windows. (Opp'n Br. at 1–2.) That contention is flatly contradicted by the fact that IBM's OS/2 had more than

(footnote continued)

antitrust injury requirement is to "enable[] antitrust courts to dispose of more claims at an early stage of litigation by simply examining the logic of the plaintiff's theory of injury." 2A Areeda, *supra* note 1, ¶ 337a. Without a clear understanding of the proper scope of antitrust injury, however, courts may simply allow dubious claims to proceed.

That appears to be what happened here, and it presents a serious policy issue. As Microsoft has noted (*see* Pet. at 8–9), the treble-damages remedy provided by the antitrust laws is a powerful incentive for plaintiffs to assert meritless claims, and the proliferation of such suits may impair the very competition the antitrust laws are meant to protect. *See* 2A Areeda, *supra* note 1, ¶ 335g (without substantial limitations on antitrust standing, courts and defendants "would be subject to endlessly proliferating suits," and "[t]he resulting liability could far exceed what was contemplated in a statute that awards ... mandatory treble damages"). Accordingly, the Court should intervene to eliminate the confusion regarding the antitrust injury requirement.

(footnote continued)

2,500 applications – including WordPerfect and Quattro Pro – but that large number of applications was deemed insufficient to overcome the "applications barrier to entry." *Microsoft Corp.*, 253 F.3d at 55.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Thomas W. Burt
Richard J. Wallis
Steven J. Aeschbacher
MICROSOFT CORPORATION
One Microsoft Way
Redmond, WA 98052
(425) 706-8080

David B. Tulchin
Counsel of Record
Steven L. Holley
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
(212) 558-4000

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